

In these proceedings, the plaintiffs applied, *inter alia*, for an order that the caveat be removed. That being the case, it fell upon the defendants to satisfy the court that on the evidence presented their claim to the land raises a serious question to be tried. Having done so, the defendant must show that, on the balance of convenience, it is better to maintain the status quo until the trial of the action, by preventing the plaintiffs from disposing of the land to some third party. See the well known Privy Council case of *Eng Mee Yong & Ors v V Letchumanan*² at p 215.

I am satisfied that the onus placed on the defendants has been discharged. There was, to say the least, *prima facie* evidence that the land had a value of \$700,000. Why then would the defendants sell it for \$400,000? That question, let alone other matters, demands judicial inquiry.

It was argued on behalf of the plaintiffs that the defendants had lodged an earlier caveat which they subsequently withdrew voluntarily and that having done so it was not open to them to lodge a second caveat, the second caveat being effectively the same as the first. Unfortunately for the plaintiffs, the decision of Edgar Joseph J in *Hock Hin Bros Sdn Bhd v Low Yat Holdings Sdn Bhd*,³ with which I respectfully agree, is against them.

I take the view that the status quo should remain and, accordingly, the defendants' caveat should stand unremoved. I dismiss the plaintiffs' application with costs to be taxed if not agreed.

Application dismissed.

Solicitors: *E Ramasamy & Co; AK Yeong & Co.*

Reported by *Zarinah Marican*

A Lee Sen Lan & Anor v Mah Kwee Hock

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO F 1946 OF 1985
LIM BENG CHOON J
25 JANUARY 1990

B *Civil Procedure — Pleadings — Defence — Application to amend — Counterclaim for contribution — Whether cause of action based on tort — Whether action maintainable under Civil Law Act 1956 — Civil Law Act 1956, ss 8(3)(b) & 19(1)(c)*

C *Damages (Personal Injury or Death) — Counterclaim for contribution — Right of contribution based on statutes — Right of contribution sui generis — Whether cause of action based on tort — Whether action maintainable under Civil Law Act 1956 — Civil Law Act 1956, ss 8(3)(b), (4) & 10(1)(c)*

D The plaintiffs were the administratrix and administrator of two deceased victims of an accident. In their joint statement of claim against the defendant, they alleged that the accident was caused solely by the negligence of the defendant. In his defence, the defendant alleged that the accident was caused wholly or in part by the negligence of the first deceased. No further steps were taken in the proceedings until two and a half years later when the defendant applied to amend his defence to include a counterclaim. The plaintiffs opposed the application by relying on s 8(3)(b) of the Civil Law Act 1956 ('the Act'), stating that the proposed counterclaim in tort was barred. The defendant argued that the claim for contribution was made pursuant to s 10 of the Act and was not caught by s 8(3)(b) as the proposed counterclaim was not based on tort but on contribution under s 10(1)(c).

Held, allowing the defendant's application:

F (1) It is clear that s 8(3)(b) of the Act places a statutory injunction against the institution of an action in tort after the stipulated period. The defendant's amendment is not grounded on any tort but rather for contribution based on the failure on the part of the first deceased victim, in his own interest, to take reasonable care of himself and thereby contributed, by his want of care, to his own injury.

G (2) The statutory right for contribution from a co-tortfeasor is a right *sui generis*. The cause of action for contribution does not arise until judgment but is a claim subsisting within s 8(4) of the Act and is not a cause of action in tort.

Cases referred to

- H 1 *Harvey v RG O'Dell Ltd & Anor* [1958] 1 All ER 657 (fold)
2 *Brambles Construction Pty Ltd v Helmers* (1965-66) 39 ALJR 410; 114 CLR 213 (refd)

Legislation referred to

- Civil Law Act 1956 ss 7, 8(3)(b), (4), 10(1)(c)
Law Reform (Married Women and Tortfeasors) Act 1935 [UK] s 6(1)(c)
Law Reform (Miscellaneous Provisions) Act 1934 [UK] s 1(3)(b)

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V Rajendran for the plaintiffs.
Tunku Farik Ismail for the defendant.

Cur Ado Vult

Lim Beng Choon J: On 7 December 1985, the plaintiffs instituted this action against the defendant claiming

damages for the benefit of the dependants of the deceased victims of a motor accident which took place on 9 August 1984. The dependency claim was made pursuant to s 7 of the Civil Law Act 1956 ('the Act'). The plaintiffs are also claiming for damages for the benefit of the estates of the deceased victims under s 8 of the Act.

The first plaintiff is the administratrix of the estate of the deceased victim, who was at the material time the rider of the motor cycle WAG 6119 ('the first deceased victim') which was involved in the accident. She was granted the letter of administration to administer the estate of the first deceased victim by the court on 20 November 1984 and the grant was extracted on 26 June 1985. The second plaintiff was likewise the administrator of the estate of the deceased victim who was at the material time riding pillion on the said motor cycle WAG 6119 ('the second deceased victim') and the letter of administration was granted to him on 11 December 1984 and the extraction of the grant was made on 26 June 1985.

To appreciate the issue raised by the plaintiffs in his opposition to the defendant's application to amend his statement of defence by altering it to include a counterclaim, a brief summary of the events leading to the present application of the defendant is necessary.

The writ of the plaintiffs together with their joint statement of claim was filed on 7 December 1985. In their joint statement of claim, they alleged that the accident was caused solely by the negligence of the defendant and particulars of negligence on the part of the defendant were set out in para 6 of the said statement of claim.

The defendant filed his statement of defence on 26 February 1986 and he alleged that the accident was caused wholly or in part by the negligence of the first deceased victim, the rider of the motor cycle WAG 6119.

No further steps were taken by either party to take out summons-for-directions or to set the case down for trial. Then on 21 July 1988, nearly two and a half years after the institution of the suit by the plaintiffs, the defendant applied to amend his statement of defence to include a counterclaim against the estate of the first deceased victim for contributions pursuant to s 10 of the Act and O 20 r 5 of the Rules of High Court 1980.

The plaintiffs opposed the application on a number of grounds but at the hearing of the application, the only ground relied on and adverted to by counsel for the plaintiffs was that the defendant was barred by sub-s (3)(b) of s 8 of the Act to institute the proposed counterclaim since that subsection says:

(3) No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person, unless proceedings against him in respect of that cause of action either —

- A (a) were pending at the date of his death; or
- (b) are taken not later than six months after his personal representative took out representation.

Counsel for the defendant, however, submitted (if I have not misunderstood him) that since the claim for contribution was made pursuant to sub-s (1)(c) of s 10 of the Act which he said allowed any tortfeasor to recover contribution from any other tortfeasor 'who is or would if sued have been liable in respect of the same damage', the defendant's application was not caught by sub-s (3)(b) of s 8 of the Act as the action in the proposed counterclaim was not based on tort but the action was for contribution which was permitted under s 10(1)(c) of the Act. The said sub-s (1)(c) of s 10 reads:

10(1) Where damage is suffered by any person as a result of a tort (whether a crime or not) —

- (c) any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tort-feasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

It is clear that from the opening sentence of sub-s (3) of s 8 of the Act which says 'No proceeding shall be maintainable in respect of a cause of action in tort' that no one can institute any proceeding against the estate of a deceased person when the underlying cause of action in the proceeding is based on tort committed by the deceased person unless the proceeding has been commenced not later than the period stipulated in para (b) of sub-s (3) of s 8. The words which I have emphasized clearly placed a statutory injunction against the institution of an action in tort after the stipulated period.

In the application for amendment made by the defendant, his proceedings are not grounded on any tort committed by the first deceased victim but rather for contribution based on the failure on the part of the first deceased victim, in his own interest, to take reasonable care of himself and thereby contributed, by his want of care, to his own injury. The statutory right for contribution from a co-tortfeasor is therefor a right *sui generis*. This proposition is enunciated in *Harvey v RG O'Dell Ltd & Anor.*¹

In that case the English High Court of the Queen's Bench Division was dealing, *inter alia*, with the scope of sub-s (3)(b) of s 1 of the Law Reform (Miscellaneous Provisions) Act 1934 which is in *pari materia* with sub-s (3)(b) of s 8 of the Act and s 6(1) of the Law Reform (Married Women and Tortfeasors) Act 1935 which again is in *pari materia* with s 10(1)(c) of the Act. To appreciate the principles enunciated in that case, it is helpful to set out briefly the facts of that case. However I need only advert to so much of the facts that are pertinent

and on which McNair J relied to support the principles enunciated by him. The plaintiff and one Galway in that case were employed by the first defendants, who were builders and repairers of barges. Galway owned a motor cycle combination which he used from time to time for his employees' purposes. On 29 February 1952, Galway, acting on the instructions of the defendants, went to Hurley to do repair work, taking the plaintiff along with him. They travelled, as they were authorized to do, in Galway's motor cycle combination. After they had worked for some hours, they went to Maidenhead (some five miles from Hurley) to get some tools and materials and to obtain some refreshments. While they were returning to Hurley in the motor cycle combination, there was a collision between the motor cycle and a motor car due to the negligence of Galway. The plaintiff was injured and Galway was killed in the accident. On 24 May 1952, letters of administration of Galway's estate was granted to his widow; and, accordingly, no action for negligence could be brought against Galway's estate on or after 24 November 1952, viz the expiration of the six months' limitation period allowed by s 1(3) of the Law Reform (Miscellaneous Provisions) Act 1934. In April 1954, the plaintiff commenced an action for damages against the first defendants alleging that Galway's employers were vicariously liable for his negligence. On 14 March 1955, the first defendants served a third party notice on Galway's administratrix claiming contributions against Galway's estate under s 6(1)(c) of the Law Reform (Married Women and Tortfeasors) Act 1935 in the event of their being held liable to the plaintiffs in damages. Upon holding that the accident was due to Galway's negligence and that the first defendants and Galway were in law joint tortfeasors, McNair J, who tried that case, posed three questions as to (i) the nature of the right of contribution; (ii) whether the cause of action for contribution was maintainable against the administratrix of Galway's estate notwithstanding sub-s (3)(b) of the Law Reform (Miscellaneous Provisions) Act 1934; and (iii) was there in the expression 'who ... would if sued have been liable' any temporal connotation referring to time at which the hypothetical action must be assumed to have brought? In answer to question (i), the learned judge said at p 669:

In my judgment, it is plainly established on the authorities that the right of contribution between tortfeasors is a *right sui generis conferred by statute* similar to the right of contribution conferred by s 30(2) of the Workmen's Compensation Act 1925; see *Littlewood v George Wimpey & Co* ([1953] 2 All ER 915); see also the same case on appeal in the House of Lords, *George Wimpey & Co Ltd v British Overseas Airways Corp* ([1954] 3 All ER 661) and *Post Office v Official Solicitor* ([1951] 1 All ER 522). Furthermore, if the third party proceedings themselves are not founded in tort, *they are not proceedings in respect of a cause of action in tort* within the meaning of s 2(3) of the Act of 1934; the expression plainly means proceedings to enforce a cause of action in tort. (Emphasis is mine).

A As to question (ii), the learned judge said at the same page:

In my judgment, it is also clear that the cause of action for contribution under the Act of 1935 did not arise until judgment in this action. I think that this conclusion is implicit, though not a matter of decision, in the speeches in the House of Lords in *Wimpey v British Overseas Airways Corp*. In *Post Office v Official Solicitor* ([1951] 1 All ER at p 525) Barry J, held (it being common ground that a similar claim for contribution under s 30(2) of the Workmen's Compensation Act 1925 did not arise until payment of compensation was made) that, notwithstanding that the payment was not made until after the death of the person from whom contribution was sought, the claim for contribution was subsisting against the deceased person at the date of his death within the meaning of s 1(1) of the Act of 1934 by reason of the provisions of s 1(4) of that Act.

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It is significant to note that s 1(4) of the Law Reform (Miscellaneous Provisions) Act 1934 referred to by McNair J in his judgment is in *pari materia* with sub-s (4) of s 8 of the Act which reads:

Where damage has been suffered by reason of any act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage was suffered, there shall be deemed, for the purposes of this section to have been subsisting against him before his death such cause of action in respect of that act or omission as would have subsisted if he had died after the damage was suffered.

And finally in his answer to question (iii), he said at p 670:

In my judgment, the phrase, 'who ... would if sued have been liable', if construed literally, contains no temporal connotation except that, for the institution of the hypothetical action, the words 'would ... have been liable' plainly contemplate that the hypothetical action has been instituted at some time before the claim for contribution arose. This, as I have found, is the date of the judgment against the party seeking contribution. Literally construed, the phrase, in my judgment, means 'who, if sued at any time, would have been liable' — that is, held liable.

A similar approach was adopted in the Australian case of *Brambles Construction Pte Ltd v Helmers*.²

With due respect I too would adopt the principle laid down in the *RG O'Dell Ltd* case.¹ Although the cause of action for contribution under sub-s (1)(c) of s 10 of the Act does not arise until judgment in this action, the claim for contribution is subsisting within the meaning of s 8(4) of the Act. Secondly, the right of contribution under s 10(1)(c) of the Act is a right *sui generis* conferred by statute and is not a cause of action in tort; therefore it is not barred by sub-s (3)(b) of s 8 of the Act. Thirdly, any cause of action instituted by the plaintiffs here in tort cannot bar the right of the defendant's claim for contribution since the first deceased victim, had he been still living, might have been liable if he had been sued. I used the words 'might have been liable' guardedly for at this stage we could not ascertain the question of liability. We are only concerned with the right of the defendant to amend his statement of defence to include a counterclaim for contri-

bution against the estate of the first deceased victim. In the premises, I have no doubt that the defendant has a right to do so. The objection of the plaintiffs is therefore dismissed and I, accordingly, allow the defendant to amend his statement of defence in the manner sought by him in his application. Costs of this proceeding are to be paid by the plaintiffs to the defendant in any event.

Application allowed.

Solicitors: *RK Nathan & Co; Azim, Ong & Krishnan.*

Reported by *Yap Shao Sin*

Public Prosecutor v Tee Kim Pong

HIGH COURT (ALOR SETAR) — CRIMINAL TRIAL NO 58-01-86
KC VOHRAH J
17 JANUARY 1990

Criminal Law — Dangerous drugs — Trafficking in — Presumption of trafficking — Rebutting presumption — Burden of proof — Dangerous Drugs Act 1952, s 39B(1)(a)

On 24 August 1985, at the Bukit Kayu Hitam Customs Complex, Kedah, the accused was found in possession of two boxes of oranges. Upon closer inspection, the customs officers discovered 12,722.90g of raw opium hidden in the bottom of the boxes and the accused was charged with trafficking in a dangerous drug under s 39B(1)(a) of the Dangerous Drugs Act 1952.

In his cautioned statement, the accused claimed that he was paid by someone in Hadyai to take the boxes to Johore Bahru where they would be picked up by someone who would meet him. He was told that the boxes contained oranges, and he had no knowledge of the raw opium.

Held, acquitting the accused:

(1) The cautioned statement had to be assessed as to whether it weakened or strengthened the prosecution's case. At the close of its case, the prosecution had established that the accused had custody of the boxes. Following the presumption in s 37(d) of the Act, from custody flows knowledge as to contents.

(2) The accused had, however, on a balance of probabilities rebutted this presumption. His explanation of how the boxes were entrusted to him and the fact that he was the one who brought the attention of the customs officers to the boxes and his subsequent assistance to the authorities were consistent with his innocence.

Cases referred to

- 1 *Lim Yow Choon v PP* [1972] 1 MLJ 205 (folld)
- 2 *Soo Heng Huat v PP* [1968] 1 MLJ 80 (folld)

Legislation referred to

Dangerous Drugs Act 1952, ss 39B(1)(a), (2), 37(da)(v)

Zamri bin Ismail (Deputy Public Prosecutor) for the Public Prosecutor.

Manjit Singh for the accused.

Cur Adv Vult

A KC Vohrah J: When the trial ended yesterday, I acquitted and discharged the accused on a charge that he on 24 August 1985 at about 3.30pm at the Immigration Complex, Bukit Kayu Hitam, Kedah, trafficked in 12,722.90g of raw opium, a dangerous drug, in contravention of s 39B(1)(a) and punishable under s 39B(2) of the Dangerous Drugs Act 1952 ('the Act'). I now give my written reasons for his acquittal.

The brief facts are these. A Malaysian tourist bus had arrived from Thailand at the customs check point for buses at the Immigration Complex, Bukit Kayu Hitam, Kedah, and a customs officer approached the bus for inspection for the passengers. She heard a voice from behind her telling her that there were things in the bus. The man who told her this was the accused and they both went to the left side of the bus where the accused opened the luggage compartment. The only things that were there were three boxes, two of which, on examination, were found to contain seven packages of a substance which a government chemist later found to be raw opium; the raw opium weighed 12,722.90g. When asked by a senior customs officer whether the 'things' belonged to him he said, 'Yes'. However, although he admitted to a senior customs officer and he also admitted in a cautioned statement that the two boxes belonged to him he denied knowing about the raw opium in the two boxes. His cautioned statement showed he had no such knowledge and I was satisfied after he had given his defence that his conduct at the customs check point was consistent with innocence and that on a balance of probabilities he was not aware that there was raw opium in the two boxes.

Customs officer Habsah (PW2) said that while she was on duty at 3.30pm on 24 August 1985 at the Bukit Kayu Hitam Immigration Complex at the inspection counter for passengers, she was instructed by another customs officer to check a Malaysian tourist bus (P9) which had arrived from Thailand.

In her evidence, Habsah said, 'While I was walking towards the bus, I heard a voice from behind telling me that things were in the bus'. She said she turned her head and she saw the accused. She then proceeded with him to the left side of the bus.

Customs officer Habsah said that the accused then opened the luggage compartment on the left side of the bus and she saw three boxes of different sizes in the compartment, the only things in the compartment. They were 'paper boxes' tied with raffia. She requested the accused to bring down and open the boxes which the accused did. And the accused first opened the smallest box (P5). There were oranges in the box and they were removed and Habsah saw at the bottom of this box a white package (P17E) wrapped with a plastic bag. Habsah said she used a pen to poke into the package and she found a blackish substance sticking to it.